

ST 96-48

Tax Type: SALES TAX

Issue: Service Occupation/Use Tax - Pre 1/1/90
Special Order v. Sale of Stock or Standard Items
Non-Filer (Failure To File Returns - Extends Limit)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	
v.)	No.
)	
TAXPAYER d/b/a)	IBT No.
CORPORATION)	Charles E. McClellan
TAXPAYER)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Alan Osheff, Special Assistant Attorney General, for the Department of Revenue; Raymond X. Henahan, Henahan & McIntyre, Ltd., for CORPORATION

Synopsis:

This matter comes on for hearing pursuant to the taxpayer's timely protest of Notice of Liability XXXXX issued by the Department on May 27, 1994, for Use Tax, Service Occupation Tax, Municipal Service Occupation Tax and RTA Service Occupation Tax. At issue are the following questions

1. Whether the Department properly included in the audit the years 1981 through 1988.
2. Whether the taxpayer was registered with the Department during the periods in question.
3. Whether the Department used proper audit procedures.
4. Whether the Department identified all non-taxable transactions for the periods covered by the audit.

Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department on all issues.

Findings of Fact:

1. The Department's *prima facie* case, including all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a total liability due and owing in the amount of \$130,751 plus interest and penalty. (Dept. Grp. Exs. Nos. 1-4).

2. TAXPAYER ("taxpayer") conducts a printing business under the name CORPORATION (Dept. Ex. No. 2).

3. Taxpayer's principal office is located at XXXXX, Arlington Heights, Illinois. (Dept. Ex. No. 1).

4. FOUNDER is the founder, principal stockholder and president of the taxpayer. (Tr. pp. 159).

5. FOUNDER also has an interest in another corporation called CORPORATION. (Stip. p. 169).

6. Taxpayer specializes in printing labels, reprints of articles appearing in magazines, and other specialized work. (Tr. p. 162).

7. The Department attempted to examine taxpayer's records from July 1, 1981 through June 30, 1993, to determine if taxpayer's liability had been satisfied under the Illinois Retailers' Occupation Tax Act, the Municipal Retailers' Occupation Tax Act, the Service Occupation Tax Act, the Service Use Tax Act and parallel retailers' and service occupation taxes under the Regional Transportation Authority Tax Act. (Tr. pp. 18, 22).

8. The Department's auditor requested records for that period but was provided only with the records for 1989 (Tr. p. 19) and for the period July 2, 1990 through June 30, 1993. (Tr. pp. 33, 122).

9. The Department's auditor examined the taxpayer's records for 1989, and, with the agreement of taxpayer's agent, selected October, November and

December as months to use for a test check to determine if taxpayer had properly paid tax on its purchases of paper, ink and other supplies. (Tr. p. 115).

10. Using the results of the test check, the auditor determined a percentage of error which he applied to the taxpayer's purchases and determined a deficiency for the audit period. (Tr. p. 132).

11. At the conclusion of the audit, the Department issued a NTL to taxpayer dated May 27, 1994. (Dept. Ex. No.1).

12. The NTL shows an assessment of Illinois Use Tax, Service Occupation Tax, Municipal Service Occupation Tax, and RTA Service Occupation Tax in the amount of \$130,751 plus interest and penalty. (Dept. Ex. No. 1).

13. Taxpayer filed a timely protest to the assessment and a hearing was held on April 22 and 23, 1996. (Tr. pp.1, 154).

Conclusions of Law:

On examination of the record established, this taxpayer has failed to demonstrate by the presentation of testimony or through exhibits or argument, evidence sufficient to overcome the Department's *prima facie* case of tax liability under the assessment in question. Accordingly, by such failure, and under the reasoning given below, the determination by the Department that CORPORATION, owes the deficiencies shown on the Correction of Returns must stand as a matter of law. In support thereof, the following conclusions are made:

ISSUES # 1 and # 2

These two issue will be considered together because whether the Department properly included in the audit the years 1981 through 1988 depends on whether the taxpayer was registered with the Department during the periods in question.

To prevail in its argument that the years 1981 through 1988 were improperly included in the audit, the taxpayer must prove that it was registered with the Department, and that it filed the required tax returns and paid the amount of tax due. The Department does not have to prove that taxpayer was not registered. The burden of proof on the issue is on the taxpayer. Jefferson Ice Co. v. Johnson, 139 Ill.App.3d 626 (1st Dist. 1985). A taxpayer's testimony is not

enough, it must present sufficient documentary evidence to support its argument. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203 (1st Dist. 1991). Taxpayer has submitted no documentary evidence of record to support its allegation that it was properly registered during the years 1981 through 1988. There was a considerable amount of questioning of the Department's auditor by taxpayer's counsel regarding taxpayer's registration, but taxpayer did not introduce any registration records into evidence. Therefore, the conclusion is that taxpayer was not registered during the years 1981 through 1988 and those years were properly included in the audit.

ISSUE # 3

In correcting a taxpayer's occupation and use tax returns, the Department of Revenue is required to use its best judgment and information. Central Furniture Mart v. Johnson, 157 Ill.App.3d 907, 910 (1st Dist. 1987); (35 ILCS § 120/4). Once the Department submits its corrected returns it establishes its *prima facie* case. [Citations omitted.] Mel-Park Drugs, Inc. v. Department of Revenue, *supra*; (35 ILCS § 120/4). Accordingly, once the Department submitted the corrected tax returns in this case it's *prima facie* case was established and the burden of proof shifted to the taxpayer. If the department's corrected returns are challenged, the courts have required only that the method employed by the department in preparing them must meet some minimum standard of reasonableness. Jefferson Ice Co. v. Johnson, *supra*. To overcome the Department's *prima facie* case, a taxpayer must present documentary support for its position. Oral testimony alone is not sufficient. Mel-Park Drugs, Inc., *supra*. Taxpayer's documentary evidence must be consistent, probable, and identified with its books and records. Central Furniture Mart, *supra*.

In this case, the record shows that the Department introduced into evidence the corrected returns and the NTL, thus establishing its *prima facie* case. Taxpayer did not introduce any documentation to support an assertion that the Department's audit procedures were improper. Although the taxpayer had four

documents marked as exhibits for identification purposes, taxpayer did not introduce them and they were not received into evidence.

Taxpayer attempted to overcome the Department's *prima facie* case in two ways. First, it called the Department's auditor and his supervisor as its witnesses. Through extensive questioning it sought to establish that the Department's assessments were not accurate. Simply questioning the Department's corrected return or the accuracy of its assessment does not shift the burden of proving the accuracy of the assessment to the Department. To do that requires corroborative evidence. Quincy Trading Post v. Department of Revenue, 12 Ill.App.3d 725 (4th Dist. 1973). However, taxpayer did not offer any corroborative evidence.

Second, taxpayer introduced testimony of FOUNDER, the founder, principal stockholder and president of the taxpayer. Although FOUNDER offered testimony of a general nature regarding his belief that his tax obligations had been handled properly, he offered nothing specific to cast doubt on the accuracy of the Department's assessment and no documentary evidence was introduced that would do so.

Because of the lack of any corroborative evidence, the taxpayer has not overcome the Department's *prima facie* case. Furthermore, the record shows that the Department's assessment was determined according to its best judgment and information, it was reasonable, and it was not arbitrary or capricious.

ISSUE # 4

The fourth issue is whether the Department identified all non-taxable transactions for periods covered by the audit. Here too, under the same principles set forth above, the burden of proof is on the taxpayer and the taxpayer offered no documentary proof whatsoever that would indicate that the Department did not identify all non-taxable transactions and treat them accordingly. Therefore, taxpayer has failed to prove that the Department's determination was erroneous.

WHEREFORE, for the reasons stated above, it is my recommendation that the Department's assessment be upheld in full.

Date

Charles E. McClellan
Administrative Law Judge